IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1967

No. 53

JAMES CLEVELAND BURGETT,

Petitioner,

v.

THE STATE OF TEXAS,

Respondent.

ON WRIT OF CERTIORARI TO THE COURT OF CRIMINAL APPEALS OF TEXAS

BRIEF FOR PETITIONER

GORDON GOOCH
FRANK W. R. HUBERT, JR.
1600 Esperson Building
Houston, Texas 77002
Attorneys for Petitioner

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Opinion Below

The opinion of the Court of Criminal Appeals of Texas (R. 67-69) is reported at 397 S.W.2d 79.

Jurisdiction

Jurisdiction rests on 28 U.S.C. 1254(1). The opinion of the highest state court in criminal cases was filed on December 15, 1965 (R. 67). A motion for leave to proceed in forma pauperis and petition for writ of certiorari was filed March 3, 1966, and granted February 20, 1967 (R. 70).

Constitutional Provision Involved

Amendment XIV to the Constitution, in pertinent part,

> nor shall any state deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

The Texas Habitual Criminal Statutes appear in Appendix A.

Questions Presented

1. Whether petitioner's right to counsel can be frustrated through collateral use of void convictions.

2. Whether convictions void on their face for denial of the right to counsel may be used in the presence of the jury without depriving the accused of a fair trial both on guilt and on punishment.

3. Whether an accused must be afforded an opportunity to challenge void convictions before the jury can be prejudiced against him.

4. Whether an accused has the right to be present when the State conducts the voir dire examination of the jury panel to be used at his trial.

5. Whether an accused has the right to a meaningful opportunity to make challenges so that he is tried by a fair and impartial jury.

These rights are all secured by the Fourteenth Amendment.

Statement

Petitioner, an indigent, was tried and convicted of "assault with intent to murder; repetition of offense" and sentenced to the state penitentiary on a jury verdict of ten years (R. 13, 14, 15). His conviction was affirmed on appeal to the Texas Court of Criminal Appeals (R. 67-69). His in forma pauperis, *pro se* motion was granted by this Honorable Court based upon his petition that his trial was held and conviction obtained in violation of rights secured him by the Fourteenth Amendment (R. 70).

Challenged Prior Convictions

In addition to the substantive offense charged, petitioner was indicted as an habitual criminal based upon one alleged Texas conviction for burglary and three alleged Tennessee convictions for forgery, the penalty being life imprisonment (R. 1-4; Art. 63, Vernon's Annotated Texas Penal Code, hereinafter referred to as Penal Code).

This District Attorney filed a pre-trial motion to prevent petitioner's attorney from informing the jury of the penalty which would automatically result if the jury found that petitioner had committed the prior offenses, because this information "might tend to result in a revolt by such jury against the arbitrary penalty of the law" (R. 4, 5). He also moved to require petitioner's counsel to offer any testimony as to penalty "out of the presence or hearing of any member of said jury or jury panel and to allow the Court to rule upon the admissibility of such evidence or testimony out of the presence and hearing of said jury panel" (R. 6).

Defendant's counsel filed a motion to quash the indictment counts on the prior convictions for failure to give notice of what respondent would attempt to prove,[1] but the record is silent as to the court's action (R. 6-9). However, the State did read the indictment to the jury before introducing any evidence, including the counts of the prior convictions (R. 12).

Thereafter, in the presence of the jury, the State offered a certified copy of one Tennessee conviction (R. 36; Resp. Ex. 5; R. 42). Petitioner objected on the grounds that the conviction on its face reflected that petitioner had no counsel in violation of the Fourteenth Amendment (R. 36). The conviction read in part, "Came the Assistant Attorney General for the State and the defendant in proper person and without counsel"; there was no recital of any waiver of his right to counsel (R. 36; Resp. Ex. 5; R. 42, 48). Ruling was reserved (R. 36). The State next offered the same conviction along with the indictment and prison records (R. 36; Resp. Ex. 6; R. 43-48). The second certified copy of the same conviction was inconsistent with the first certified copy, *inter alia*, since the words "and without counsel" were not included, but again there was no recital that petitioner waived his right to counsel (R. 36; Resp. Ex. 6; R. 43-48).[2] Petitioner objected on the same grounds (R. 36). Ruling was reserved (R. 36).

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[1] The reason stated for filing the motion to quash as reflected in the amended motion for new trial overruled by the Court without qualification (R. 18, 19) was so "defendant could establish the admissibility before they were read into the record in the presence of the jury; same reading into the record in the presence of the jury was prejudicial to defendant herein" (R. 18).

[2] See Appendix B for comparison of Exhibits 5 and 6, the inconsistent versions of the same conviction.

The State next offered a Texas indictment which was admitted without objection (R. 37; Resp. Ex. 7, R. 49-50). Then the Texas conviction was marked and discussed in the presence of the jury (R. 37-38; R. 52-55) and apparently admitted (R. 41). A hearing on the Texas conviction was held partly in the absence of the jury (R. 37-41). Upon conclusion, the Court admitted into evidence the second version of the Tennessee conviction (Resp. Ex. 6; R. 43-48), (along with a reference to a third conviction that was never offered into evidence (R. 46; Resp. Ex. 6)) but excluded the Texas conviction (Resp. Ex. 8; R. 52-55) as being void on its face on state law grounds (R. 41).

The next record reference to prior convictions is in the Court's Charge:

> "You are further instructed that the State during the trial of this case offered evidence that might be considered as tending to show the commission of other offenses prior to the 15th day of April, 1964, that all such evidence is withdrawn from you and you will not consider such evidence for any purpose whatsoever in arriving at your verdict. You should not mention or discuss in your deliberations (sic) such evidence or that portion of the indictment read to you attempting to charge such prior offenses." (R. 11-12)

Despite demand for vindication of his right to counsel (Brief in Tex. Crim. App., pp. 4-6), the Court of Criminal Appeals held that since petitioner was not given enhanced punishment [life] and since the above instructions were given, no error was presented (R. 69).

Absence During Voir Dire

On Monday of the week in which petitioner's case was called, another unrelated case went to trial (R. 62, 63-64). The State conducted a voir dire examination of the jury panel (R. 62-63). Petitioner was not given an opportunity to be present during the State's examination (R. 63), although his court-appointed counsel was present to represent the accused in the other trial (R. 62-63). On Thursday petitioner's case was called; he was brought into court for the first time and substantially the same jury panel was used (R. 60, 64-65). The State interrogated only three new veniremen (R. 58), addressing only general remarks to the whole panel (R. 59). Petitioner's counsel was not prohibited from interrogating the jury panel (R. 60). On motion for new trial, petitioner raised the denial of his right to be present during voir dire on state law grounds (R. 16, 17). After a hearing (R. 56-66), the motion was overruled (R. 19). On appeal on citations of state authority (Brief in Tex. Crim. App., pp. 6-9), the Court of Criminal Appeals held that the error was improperly preserved as to form but concluded "If the contention was properly before us for review, no error would be presented" (R. 69).

Summary of Argument

Petitioner was convicted of assault with intent to murder; repetition of offense and sentenced to ten years by a jury. The Court of Criminal Appeals affirmed. Certiorari was granted on Petitioner's Fourteenth Amendment claim that his right to counsel has been twice frustrated and claim that he was denied the right to attend a voir dire examination of his jury by the prosecution.

Petitioner was denied the right to counsel in at least one Tennessee conviction; Texas invoked its habitual criminal statute alleging this conviction and proving it before the jury. Despite a motion to quash and an objection, the jury was informed of four alleged prior convictions at the outset, heard evidence of at least two void convictions (one Tennessee conviction void for denial of counsel; one Texas conviction void on State law grounds) and had the one void Tennessee conviction admitted into evidence—although two convictions are required under State law. The other two alleged convictions were never even offered.

The Tennessee conviction admitted into evidence was void on its face under *Carnley* v. *Cochran,* 369 U.S. 506 (1962), and *Gideon* v. *Wainwright,* 372 U.S. 335 (1963)—as the District Attorney knew or should have known. The habitual criminal charge should never have been used in front of the jury since not even one valid conviction could be proven. *Greer* v. *Beto,* 384 U.S. 269 (1966), conclusively establishes that the Tennessee conviction could not be used for enhancement.

Although the jury had heard all of this "evidence", they were never told that there were no valid convictions against petitioner. Instead, the court gave the sterile instruction not to consider the evidence of prior crimes.

In reviewing petitioner's conviction, the Court of Criminal Appeals applied a "no possible error" standard that violates *Fahy* v. *Connecticut,* 375 U.S. 85 (1962), and *Chapman* v. *California,* 386 U.S. 18 (1967); the proper standard is that the State must prove beyond a reasonable doubt that the unconstitutional evidence did not contribute to the verdict of guilty or to the amount of the punishment assessed by the jury.

The instruction could not "cure" the effect of this needless and prejudicial information under standards long established by this Court. E.g., *Waldron* v. *Waldron*, 156 U.S. 361 (1895).

Spencer v. *Texas*, 385 U.S. 554 (1967), permitting the one-stage habitual criminal charge procedure is not applicable since *Spencer* involved valid convictions while petitioner's does not. There is no legitimate State interest in taking advantage of the denial of the right to counsel, and there is nothing to balance against petitioner's right to a fair jury in this case.

Petitioner is entitled to a fair trial on the issue of guilt and on the issue of punishment. Unless the State can prove beyond a reasonable doubt that the jury would have awarded the same penalty in the absence of knowledge of the prior convictions, the ten year sentence demonstrates the degree of harm to petitioner, for he could have been fined as little as five dollars under the court's charge.

The court has been quick to protect the institution of trial by jury from influences which threaten fairness and impartiality—such as *Turner* v. *Louisiana*, 379 U.S. 466 (1965), *Rideau* v. *Louisiana*, 373 U.S. 723 (1963), and *Parker* v. *Gladden*, 385 U.S. 363 (1967). E.g., if a bailiff's statement, *inter alia*, to one juror that the defendant is a "wicked" fellow taints the jury, so does improper proof of four alleged convictions, two of which were void, and two of which were never even offered into evidence.

Petitioner must have an opportunity to challenge void convictions before the jury is prejudiced. Without overruling *Spencer* and requiring a two-stage trial, relief can be afforded by sanctioning a hearing *in camera*, *Jackson*

v. *Denno,* 378 U.S. 368 (1964), by requiring a pre-trial discovery, *Miller* v. *Pate,* 386 U.S. 1 (1967), or by prohibiting suppression by the State, *Brady* v. *Maryland,* 373 U.S. 83 (1963).

Prejudice on the issue of guilt can be avoided by requiring a two-stage trial—overruling *Spencer.*

Petitioner's right to counsel has been frustrated twice: once when he was convicted in Tennessee without counsel, and once when his Tennessee conviction was used against him in Texas. This double denial of a fundamental constitutional right can only be corrected by a reversal of this conviction.

The alternative ground for reversal involves two independent but related rights. The first is the right of a person charged with a crime to be present throughout his trial, which begins when the work of impaneling the jury begins. *Lewis* v. *United States,* 146 U.S. 370 (1892). The second is the right to hear the State's questions to the jury panel in order to detect prejudice so that intelligent challenges can be made. Deprivation of this right is automatic reversal. *Swain* v. *Alabama,* 380 U.S. 202 (1965).

Petitioner does not know whether he had a fair and impartial jury to begin with, since he was not allowed to be present during the State's voir dire. Even if the jury started out fair, they could not remain fair long, hearing the indictment and the allegations of prior crimes and convictions.

The Court should reverse and remand for a new trial.

I.

Whether Petitioner's Right to Counsel Can Be Frustrated Through Collateral Use of Void Convictions.

1. *The jury was informed of the alleged prior convictions despite petitioner's efforts.*

Petitioner has suffered prejudice from the denial of his right to counsel at least twice—once when he was imprisoned in Tennessee, and now while he is imprisoned in Texas. In order to evaluate this brief, one must understand the peculiarities of the State law.

In Texas, assessing punishment when penalty is not fixed by law is a jury function. So is determination of recidivism. (These were mandatory jury functions at the time of the trial, the reformed Code makes these functions permissive in some cases. Compare Texas Code of Criminal Procedure, Art. 693 with Art. 37.07 of the reformed Code effective January 1, 1966. See, Onion, *Special Commentary*, 3 Vernon's Ann. Tex. Code of Crim. Pro. 629 (1966).)

For a defendant to be convicted as a habitual criminal under Texas law in the circumstances of this case, the State must prove, *inter alia*, two convictions prior to the date of the substantive offense charged (Texas Penal Code, Art. 63). The penalty is mandatory life imprisonment (Texas Penal Code, Art. 63). The State may allege as many prior convictions as it wishes in the indictment, may read the indictment to the jury, and then may prove more than the requisite two, as the District Attorney pleases. *Carso* v. *State*, 375 S.W.2d 297 (Tex. Crim. App. 1963); *Mullins* v. *State*, 409 S.W.2d 869 (Tex. Crim. App. 1966) (Fifteen prior convictions shown).

The trial court does not have to hold a pre-trial hearing on whether the convictions used to invoke the habitual criminal statutes are void. E.g., *McGowen* v. *State,* 290 S.W.2d 521 (Tex. Crim. App. 1956).

Filing a habeas corpus action in the sister state to challenge the underlying prior convictions accomplishes nothing. Not only is the conviction still available for enhancement purposes, but the defendant cannot even inform the jury that he is challenging his prior conviction on constitutional grounds. *Shannon* v. *State,* 338 S.W.2d 462 (Tex. Crim. App. 1960). In petitioner's case, he went to trial on April 29, 1965, on an indictment filed April 7, 1965—hardly time to prosecute a habeas corpus action in Tennessee, assuming that, as an indigent, he had the means of doing so and assuming further that he could surmount the obstacle of mootness. E.g., *Parker* v. *Ellis,* 362 U.S. 574 (1960).

Before petitioner's trial began, his court-appointed counsel filed a "motion to quash" which was the only adaptable procedural step in the then existing Code of Criminal Procedure. See Vernon's Texas CCP (1948) Arts. 504-537; e.g., *Ex parte Brown,* 165 S.W.2d 718 (TCA 1942). The motion was leveled at the prior convictions alleged in order to obtain more information other than the bare allegations. (On motion for new trial, overruled by the Court without qualification, petitioner's counsel stated that the purpose for the motion to quash was in order to determine the admissibility of the prior convictions before trial in order to avoid the prejudice which would result to petitioner if the jury were informed of void convictions.) (R. 18.) However, the record does not indicate that petitioner was accorded any relief on his motion to quash. Not that he could reasonably expect any.

There is no requirement that the evidence of prior convictions be served on defendant, nor is there any requirement that copies be given to the defendant before trial. *Warden* v. *State*, 366 S.W.2d 786 (Tex. Crim. App. 1963); *Roberts* v. *State*, 400 S.W.2d 903 (Tex. Crim. App. 1966). At time of the trial there were no discovery procedures in the Code of Criminal Procedure; motions to suppress evidence were not permitted. E.g., *Padgett* v. *State*, 364 S.W.2d 397 (Tex. Crim. App. 1963); Morrison, *Interpretive Commentary*, 2 Vernon's Texas Code of Criminal Procedure 340 (1966).

The indictment was read to the jury, and the jury was informed that petitioner had been "duly and legally" convicted on four previous occasions (R. 2-3). Only one of the three Tennessee convictions alleged for enhancement purposes was ever offered into evidence (R. 36). (On this record, therefore, we do not know whether the other two Tennessee convictions were also void for denial of right to counsel.)

2. *The conviction used to invoke the habitual criminal statute and admitted into evidence was void for denial of petitioner's right to counsel.*

With regard to the one conviction offered and admitted into evidence, critical observations must be made:

First, the District Attorney had a serious problem. He had two inconsistent versions of the same alleged "valid" conviction.[3] Obviously, both could not be "valid", but having withheld the evidence until offered before the jury, he simply offered both versions into evidence.

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[3] See Appendix B for comparison.

Assuming good faith on the part of the State, neither conviction—or rather neither version of the same conviction—could survive constitutional scrutiny. The State alleged before the jury and offered into evidence a conviction which showed that petitioner had been denied the right to counsel. This conviction was void on its face, as any lawyer—but no juror—knew or should have known.

The District Attorney either overlooked or disregarded the unambiguous holdings of this Court that no man can be deprived of his life or liberty by any state when his right to counsel has been denied.

Over two years before petitioner's trial began, this Court, in *Carnley* v. *Cochran,* 369 U.S. 506 (1962), held:

> "Presuming waiver from a silent record is impermissible. The record must show, or there must be an allegation and evidence which show that an accused was offered counsel but intelligently and understandingly rejected the offer. Anything less is not waiver." 369 U.S. at 516.
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> "Where . . . the constitutional infirmity of trial without counsel is manifest, and there is not even an allegation, much less a showing, of affirmative waiver, the accused is entitled to relief from his unconstitutional conviction." 369 U.S. at 517.

One version of the conviction offered into evidence expressly stated that petitioner was without counsel. The other version was silent. Neither contained any allegation or recital of waiver of counsel. No other evidence was offered. Therefore, both were void on their face under *Carnley* v. *Cochran, supra,* unless for some reason petitioner had no right to counsel.

But *Gideon* v. *Wainwright,* 372 U.S. 335 (1963), could hardly have escaped the State's attention. *Gideon* established the unequivocal right to counsel for all persons standing accused of a felony in a state court, and this Court's summary reversal in *Pichelsimer* v. *Wainwright,* 375 U.S. 2 (1963) and in *Doughty* v. *Maxwell,* 376 U.S. 202 (1964), established clearly that *Gideon* applied retrospectively to all convictions, since denial of right to counsel infects the very integrity of the fact finding process. *Stovall* v. *Denno,* 87 Sup. Ct. 1967 (1967). See *Linkletter* v. *Walker,* 381 U.S. 618, 628, note 13 (1963); *Tehan* v. *Shott,* 382 U.S. 406, 416 (1966); *Johnson* v. *New Jersey,* 384 U.S. 719, 727 (1966). Thus, the inevitable conclusion, compelled before petitioner ever went to trial, was that the Tennessee conviction was void and was not available to invoke the habitual criminal act.

Contemporaneous and subsequent federal cases have cast no doubt on that conclusion.

The Courts of Appeal have rejected the validity of utilizing pre-*Gideon* convictions void for denial of the right to counsel in recidivist proceedings. *LaNear* v. *LaVallee,* 306 F.2d 417 (CA 2, 1962); *U.S. ex rel. Compton* v. *Wilkins,* 315 F.2d 865 (CA 2, 1963); *Jones* v. *Cunningham,* 319 F.2d 2 (CA 4, 1963); *U.S. ex rel. Durocher* v. *LaVallee,* 330 F.2d 303 (CA 2, *en banc,* 1964); *U.S. ex rel. Baldridge* v. *Pate,* 343 F.2d 537 (CA 7, 1965), 371 F.2d 424 (CA 7, 1966); *Harris* v. *Boles,* 349 F.2d 607 (CA 4, 1965); *Browning* v. *Crouse,* 356 F.2d 178 (CA 10, 1966); *Horne* v. *Peyton,* 356 F.2d 631 (CA 4, 1966). See *U.S. ex rel. Bagley* v. *LaVallee,* 332 F.2d 890 (CA 3, 1965); *Browning* v. *Crouse,* 327 F.2d 529 (CA 10, 1964).

This Court, in *Greer* v. *Beto,* 384 U.S. 269 (1966), summarily reversed a Texas denial of habeas corpus in a recidivist case when the underlying prior conviction was challenged on the denial of right to counsel. The Texas Court of Criminal Appeals thereafter recognized that convictions void for denial of counsel could not be used to invoke the habitual criminal statutes. *Ex parte Hammonds,* 407 S.W. 2d 779 (Tex. Crim. App. 1966); *Ex parte Greer,* 408 S.W.2d 711 (Tex. Crim. App. 1966); *Ex parte Morgan,* 412 S.W.2d 657 (Tex. Crim. App. 1967).

Horne v. *Peyton, supra* at 632, records the commendable Virginia recognition that convictions void for denial of right to counsel are not available for recidivist purposes. Texas displayed candor in the brief in opposition in this case, stating, "Due to the fact that petitioner was not represented by counsel in the Tennessee conviction . . . the State's proof failed. . . ." (Response, p. 3) This concession, though compelled by authority, came too late to protect petitioner's right to a fair trial. Recognition of petitioner's basic Fourteenth Amendment rights should have resulted in abandonment of the habitual criminal charge by the State before the indictment was ever read to the jury.[4] Nevertheless, the conviction was admitted into evidence, despite the motion to quash and despite the objection to the introduction of both versions of the same conviction on grounds that petitioner's right to counsel under the Fourteenth Amendment had been denied.

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[4] Under Article 63, two convictions are required. If the Tennessee convictions had been ruled out before the trial, the enhancement counts would have been quashed. Also, if the State conviction had been ruled out before the trial—instead of during the trial—again the enhancement counts would have been quashed. Only one of the Tennessee convictions alleged was available for enhancement, even if all were valid, because they occurred on the same date. *Mullins* v. *State,* 409 S.W.2d 869 (Tex. Crim. App. 1966).

II.

Whether Convictions Void on Their Face for Denial of the Right to Counsel May Be Used in the Presence of the Jury Without Depriving the Accused of a Fair Trial Both on Guilt and on Punishment.

1. *The State standard for review of the right to a fair trial violated the due process clause.*

The Court of Criminal Appeals rejected petitioner's demand for his Fourteenth Amendment rights, holding, "In view of such instructions by the court and no enhancement having been made as a result of the jury's verdict, no error is presented. . . ." (R. 69; 397 S.W.2d 79, 80) The citations to authority relied upon for this result are based on the fiat that no error is possible unless the penalty has actually been enhanced.

But this conclusion violates the standard set by this Court in *Chapman* v. *California,* 386 U.S. 18 (1967) and *Fahy* v. *Connecticut,* 375 U.S. 85 (1962).

In *Fahy* v. *Connecticut, supra,* the Supreme Court of Errors of Connecticut held that evidence had been used at the defendant's trial which had been obtained by means of an illegal search and seizure, citing *Mapp* v. *Ohio,* 367 U.S. 643 (1961), but that the admission of such evidence was harmless error. This Court reversed and remanded, stating:

> "We find that the erroneous admission of this unconstitutionally obtained evidence at this petitioner's trial was prejudicial; therefore, the error was not harmless, and the conviction must be reversed. We are not con-

cerned here with whether there was sufficient evidence on which the petitioner could have been convicted without the evidence complained of. The question is whether there is a *reasonable possibility* that the evidence complained of *might* have contributed to the conviction. . . ." (emphasis added)

In *Chapman* v. *California,* 386 U.S. 18 (1967), this Court relied on *Fahy* v. *Connecticut* in fashioning a harmless constitutional-error rule:

"There is little, if any, difference between our statement in *Fahy* v. *State of Connecticut* about 'whether there is a reasonable possibility that the evidence complained of might have contributed to the conviction' and requiring the beneficiary of a constitutional error to prove beyond a reasonable doubt that the error complained of did not contribute to the verdict obtained. We, therefore, do no more than adhere to the meaning of our *Fahy* case when we hold, as we do now, that before a federal constitutional error can be held harmless, the court must be able to declare a belief that it was harmless beyond a reasonable doubt. . . ." (emphasis added)

2. *There is no justification for the State's position which does not violate the due process clause.*

Justification for the Court of Criminal Appeals' position must be based on one or more of the following invalid assumptions:

a. That evidence of prior convictions is not prejudicial on the issue of guilt.

b. That the knowledge of the prior convictions was effectively washed from the brains of the jurors by the trial court's charge.

c. That the petitioner would have received the same punishment assessed by the jury even if the evidence concerning prior convictions had not been brought to their attention.

d. That petitioner shows no harm since the penalty was only assessed at ten years instead of life imprisonment.

Besides violating the *Chapman* and *Fahy* standards, each assumption is intrinsically untenable.

a. The proposition that evidence of prior convictions affects the jury's objectivity in deciding the question of guilt of the primary offense hardly needs empirical documentation.

The *per curiam* reversal of *Leonard* v. *United States*, 378 U.S. 544 (1964) when the jury panel witnessed another jury return a verdict of guilty against the same defendant manifests the recognition by this Court of the prejudicial effect of this information. See also *Marshall* v. *United States*, 360 U.S. 310 (1959).

All permissible uses of prior convictions in evidence generally are intended to reflect on defendant's character. See generally McCormick on Evidence, §§157-158 (1954 ed.); 1 Wigmore on Evidence, §§215-218 (1964 ed.). E.g., when admitted for impeachment purposes, the intended result is to show defendant's bad character to the jury. It is difficult to justify the conclusion that somehow convictions evoke revulsion in the minds of the jurors for some purposes but not for others. In fact, in Texas, it is offi-

cially recognized that the evidence of prior convictions used for enhancement purposes is more than antiseptic—it shows to the jury the defendant's "persistence" in crime. *Ex parte Crawford*, 379 S.W.2d 663 (Tex. Crim. App. 1964).

But perhaps the best evidence of the propensities of jurors comes from the State itself. The State considered the jurors in petitioner's case so fragile of mind that it sought an order from the trial court that the jury not be informed that petitioner would receive a life sentence if convicted. The stated reason for this motion was that the jury might react unfavorably to this arbitrary penalty. Thus, the State wished the jury to know of the prior convictions, but did not think that the jury would be able to be "fair" to the State if they knew the significance (R. 5).

Without the evidence of the void convictions, would the jury have acquitted petitioner altogether? Or, in accordance with the court's charge, would the jury have found petitioner guilty of a lesser included offense, perhaps a misdemeanor? Petitioner's trial lasted one day. Balanced against an additional one day of expense to the State for another trial is up to ten years of petitioner's life, also at State expense, in the state penitentiary. It is manifestly just that the answer to this question be obtained without speculation. As previously demonstrated, petitioner is not required to prove that the jury would have reached a different result. *Chapman* and *Fahy* require the State of Texas to prove beyond a reasonable doubt that petitioner would have been convicted of the highest grade of offense charged and would have been assessed ten years imprisonment even if the jury had never learned of petitioner's prior convictions. This is a heavy burden in this case, and properly so.

b. It is an "unmitigated fiction" that the Court's instruction to the jury to disregard evidence of prior convictions is effective. Cf. *Krulewitch* v. *United States,* 336 U.S. 440, 453 (1949) (concurring opinion of Mr. Justice Jackson). The fiction that the jury will be presumed to disregard unconstitutionally obtained evidence has been rejected in *Jackson* v. *Denno,* 378 U.S. 368 (1964).

Respondent may seek comfort in *Spencer* v. *Texas,* 385 U.S. 554 (1967) holding that the old Texas procedure[5] in habitual criminal cases does not violate the Fourteenth Amendment by allowing the jury to be advised of prior convictions before passing on guilt or innocence on the current offense when an adequate instruction is given.

The Court recognized the potentiality for prejudice but found the prejudice outweighed by a valid State purpose. But here the State has no legitimate interest in violating the Fourteenth Amendment rights of petitioner nor of being a beneficiary of another state's violation of petitioner's rights.

Spencer's case is not petitioner's case for the simple reason that *Spencer* involved *valid* prior convictions; petitioner's case does not.

The opinion in *Spencer* balanced the legitimate State interest in punishing recidivists against the defendant's right to a fair and impartial jury. In petitioner's case, there is nothing to balance against petitioner's right to a fair jury. There is no legitimate State interest in taking advantage of the denial of the right to counsel, either in

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[5] This procedure was reformed effective January 1, 1966. Art. 37.07, Vernon's Ann. Texas Code of Crim. Pro.

depriving him of his liberty in the first instance, or in using the conviction against him in a subsequent proceeding.

Furthermore, this Court has long recognized that some evidence, first admitted and then withdrawn, is so prejudicial that even a firm instruction to the jury to disregard will be ineffective.

> "The general rule is that if evidence which may have been taken in the course of a trial, be withdrawn from the consideration of the jury by the direction of the presiding judge, that such direction cures any error which may have been committed by its introduction. . . . But yet there may be instances where such a strong impression has been made upon the minds of the jury by illegal and improper testimony, and that its subsequent withdrawal will not remove the effect caused by its admission, and in that case the general objection may avail on appeal or writ of error." *Throckmorton* v. *Holt,* 180 U.S. 552, 567 (1907); see *Hopt* v. *Utah,* 120 U.S. 430, 438 (1887).

In *Waldron* v. *Waldron,* 156 U.S. 361 (1895), this Court reversed and remanded for a new trial because a party's character had been improperly questioned by evidence of adultery, even though the trial court firmly instructed the jury to disregard, stating:

> "There is an exception, however, to this general rule, by virtue of which the curative effect of the correction, in any particular instance, depends upon whether or not considering the whole case and its particular circumstances, the error committed appears to have been

> of so serious a nature that it must have affected the minds of the jury despite the correction by the court." 156 U.S. at 383.

See *Tipton* v. *Socony Mobil,* 375 U.S. 34 (1963) (reversal despite limiting instruction when jury informed of workmen's compensation insurance when a worker was trying to obtain damages for his injuries).

The Courts of Appeals have been applying this principle steadily in reversing criminal convictions. E.g., *Lawrence* v. *United States,* 357 F.2d 434 (CA 10, 1966); *United States* v. *Clarke,* 343 F.2d 90 (CA 3, 1965); *United States* v. *De Dominicis,* 332 F.2d 207 (CA 2, 1964); *Helton* v. *United States,* 221 F.2d 338 (CA 5, 1955).

This is particularly appropriate in reviewing a Texas case because even when jurors consciously disregard instructions limiting use of evidence, the Court of Criminal Appeals does not necessarily provide a new trial. *Gonzales* v. *State,* 398 S.W.2d 132 (Tex. Crim. App. 1960).

Yet, even the Court of Criminal Appeals consistently holds that evidence of extraneous offenses is so prejudicial that an instruction to disregard is not a cure in non-recidivist proceedings. E.g., *Lucas* v. *State,* 378 S.W.2d 340 (Tex. Crim. App. 1964); *Priest* v. *State,* 282 S.W.2d 390 (Tex. Crim. App. 1955).

c. & d. Finally, any assumption that petitioner would have received the same sentence if the unconstitutionally obtained evidence had not been admitted transcends speculation and approaches divination. And the assumption of "lack of harm" because petitioner was assessed only ten years instead of life imprisonment ignores reality. Peti-

tioner could have received as little as a five dollar fine under the court's charge (R. 11).

In a state where murder can be punished by the jury with as little as two years probation, ten years imprisonment for assault with intent to murder does not appear to be a gratuity to petitioner. Vernon's Ann. Texas Pen. Code, Art. 1257, 1257a; Vernon's Ann. Texas Code of Crim. Pro., Art. 42.12.

Petitioner is entitled to as fair a hearing on the issue of punishment as on the issue of guilt. See *Brady* v. *Maryland*, 373 U.S. 83 (1963).

The Second Circuit, *en banc*, has already held that a defendant whose punishment is not enhanced nevertheless suffers prejudice on the issue of punishment when a void prior conviction taints his hearing. *U. S. ex rel. Durocher* v. *LaVallee*, 330 F.2d 303, 305, n. 2 (CA 2, *en banc*, 1963). He is entitled to a hearing free from consideration of his void prior conviction.

3. *The integrity of the jury system cannot tolerate this threat to fairness and impartiality.*

Whenever the integrity of the jury system is threatened, prophylactic measures have been taken without delay for a quantitative analysis of the possible harm. See, e.g., *Rideau* v. *Louisiana*, 373 U.S. 723 (1963); *Turner* v. *Louisiana*, 379 U.S. 466 (1965); *Estes* v. *Texas*, 381 U.S. 532 (1965); *Parker* v. *Gladden*, 385 U.S. 363 (1967). This case calls for equal treatment. If mere exposure of the jury to bailiffs who were witnesses (*Turner*), if a comment to one juror by a bailiff that the defendant is wicked and to two others that the Supreme Court will correct any errors

(*Parker*), if three jurors witnessing a televised confession (*Rideau*), taints the whole jury—as it clearly does—then a fortiori wanton exposure to four convictions taints the jury.

III.

Whether an Accused Must Be Afforded an Opportunity to Challenge Void Convictions Before the Jury Can Be Prejudiced Against Him.

1. *Prejudice can be avoided without requiring a two-stage trial.*

It is not necessary to overrule *Spencer* v. *Texas, supra,* permitting a one-stage trial procedure in recidivist cases. Regardless of the procedural device used in informing the jury of void convictions—whether it be a one-stage trial, a two-stage trial, or a separate trial—petitioner and all victims of the deprivation of right to counsel suffer. A conviction void on its face for denial of the right to counsel should never be brought to the jury's attention.

To afford petitioner an opportunity to vindicate his right to counsel, the State may select from any number of procedural safeguards. Among them are procedures already sanctioned by this Court:

a. Simple procedural protection, similar to that afforded by *Jackson* v. *Denno* (although rejected in *Spencer* v. *Texas, supra,* on other grounds), would suffice to prevent the unconscionable as well as the mistaken efforts to use a void prior conviction against a man accused of another crime. In petitioner's case, an *in camera* hearing was held before the jury was informed of petitioner's "confession"

without disrupting proceedings unduly; in fact, the jury never was informed of petitioner's confession since the court found that physical and mental coercion had been inflicted on petitioner. Also, a partial hearing *in camera* was held on the issue of void State convictions.

As a corollary to the State's right to prevent defendant's counsel from informing the jury of the punishment under the habitual criminal statute, e.g., *Buhl* v. *State,* 387 S.W. 2d 677, 678 (Tex. Crim. App. 1965); *Preble* v. *State,* 374 S.W.2d 444, 445 (Tex. Crim. App. 1963), the State demanded in petitioner's case that any such evidence petitioner wished to offer first be presented to the court out of the hearing of the jury (R. 5, 6).

It is oppressive for the State to demand a hearing *in camera* for itself *before* evidence is offered and then deny a like opportunity for the defendant. While "sauce for the goose" may not be a constitutional standard, it is so naturally fair that even kindergarten children can understand and appreciate it.

Under Texas law, it is already the court's function and duty to examine the conviction to see that it is valid for enhancement purposes. The jury's function is simply to pass on the "historical fact" of identity between the person previously convicted and the person now charged with crime. E.g., *Doby* v. *State,* 383 S.W.2d 418 (Tex. Crim. App. 1964). Unless identity is an issue, there is no justification for informing the jury at all.

Thus, existing procedures—if made available to defendants on equal terms with the State—would guarantee that the jury is not prejudiced by the use of unconstitutionally obtained convictions.

Since January, 1966, the State no longer requires that all objections to evidence be made at the time of offer before the jury; the courts *may* now entertain motions to suppress. Vernon's Ann. Tex. Code of Crim. Pro. 28.01(6), Morrison, *Interpretive Commentary*, 2 Vernon's Ann. Tex. Code of Crim. Pro. 340 (1966); *Padgett* v. *State*, 364 S.W.2d 397 (Tex. Crim. App. 1963). Before 1966, the courts sometimes held hearings *in camera* to determine whether the conviction was void—but only *after* the convictions had been offered into evidence. See, e.g., *Doby* v. *State*, 383 S.W.2d 418 (Tex. Crim. App. 1964). A minor change in procedure would adequately protect petitioner's rights: all that is required is the right to a hearing *before* the evidence is called to the jury's attention.

b. A recognition of the right to pre-trial examination of the prior conviction to be offered by the State as part of the "tangible evidence" within the holding of *Miller* v. *Pate*, 386 U.S. 1 (1967) would suffice. There, as here, the defendants sought access to tangible evidence before trial, only to be denied any opportunity to do anything other than to object when the State offered the evidence. There "bloodstained" underwear turned out to be paint when defendant finally was afforded an opportunity to inspect the evidence out of the presence of the jury. Here a "valid" prior conviction turned out to be void on its face.

c. Furthermore, petitioner's request for more information made prior to trial in his motion to quash invoked the mandatory duty of the prosecutor to furnish petitioner evidence which was relevant not only to the issue of guilt but also evidence relevant to the issue of punishment. *Brady* v. *Maryland*, 373 U.S. 83, 87 (1963). No evidence was more relevant to punishment than the evi-

dence the State intended to offer on prior convictions, yet this was withheld despite demand.

State denial of the opportunity for petitioner's counsel to inspect and to object to the alleged prior convictions proves the wisdom of the Court's decision in *Reynolds* v. *Cochran,* 365 U.S. 525 (1961). There a motion for continuance to obtain counsel was denied, and no counsel had an opportunity to challenge the prior convictions. Reversing, the Court noted that "we cannot know that counsel could not have found defects in the 1934 conviction that would have precluded its admission in a multiple offender proceeding". 365 U.S. at 531. In petitioner's case, the Court is assured that petitioner's counsel would have found the defects had he just been given the opportunity.

2. *Prejudice on the issue of guilt can be avoided by requiring a two-stage trial.*

While petitioner need not necessarily petition this Court to reconsider *Spencer,* it is pertinent to note that had a two-stage trial procedure been available to him, he would have had an opportunity for a trial on the issue of guilt without having to surmount the information in the jury's mind about four prior convictions. This provides an alternative basis for reversal of petitioner's conviction.

The Chief Justice's dissenting opinion observes, "Only seventeen states still maintain the needlessly prejudicial procedure exemplified in these three cases. The decision I propose would require only a small number of states to make a relatively minor adjustment in their criminal procedure to avoid the manifest unfairness and prejudice which has already been eliminated in England and in thirty-three of the United States."

Petitioner's right to counsel has been frustrated twice —once when he was convicted in Tennessee without counsel; once when his Tennessee conviction was used against him in Texas. This double denial of a fundamental constitutional right can only be corrected by a reversal of his conviction, for which he prays.

IV.

Whether an Accused Has the Right to Be Present When the State Conducts the Voir Dire Examination of the Jury Panel to Be Used at His Trial.

V.

Whether an Accused Has the Right to a Meaningful Opportunity to Make Challenges So That He Is Tried by a Fair and Impartial Jury.

On Monday of the week of petitioner's trial, the State conducted a voir dire examination of the jury panel (R. 62-63). Petitioner was not present during this examination, although by chance his appointed lawyer was there (R. 62-63). His appointed lawyer was there because he was defending another accused (R. 62). On Thursday of that week, petitioner was brought to court for the first time and only three new members of the panel were individually interrogated in his presence by the prosecution (R. 58, 60, 64-65).

There are two related but separate rights to protect under the Fourteenth Amendment.

The first is the right to attend all phases of one's own trial. "He shall be personally present at the trial, that is, at every stage of the trial when his substantial rights

may be affected by the proceedings against him. If he be deprived of his life or liberty without being so present, such deprivation would be without that due process of law required by the Constitution." *Hopt* v. *Utah*, 110 U.S. 579 (1884). And the trial begins "when the work of impaneling the jury begins". *Lewis* v. *United States*, 146 U.S. 370, 374 (1892); *Hopt* v. *Utah*, 110 U.S. 574, 578 (1884). See *Swabb* v. *Berggren*, 143 U.S. 442, 448 (1891) (" . . . the personal presence of the accused from beginning to end of the trial for a felony involving life or liberty . . . must be assumed to be vital to the proper conduct of his defense and cannot be dispensed with"). His absence can be tolerated only when his rights cannot be affected. E.g., *Snyder* v. *Massachusetts*, 291 U.S. 97 (1933).

The second is the right to exercise meaningful challenges so that the jury is fair and impartial.

Both rights were denied petitioner, since he was not allowed to be present when the State conducted the voir dire examination of the entire jury panel.

It would be difficult to find an experienced trial lawyer who would take the position that the voir dire examination of the jury is not a crucial part of the trial. The reaction of a prospective juror to the questions of the District Attorney provide significant, often vital, information upon which to base peremptory challenges or challenges for cause. This Court has recognized that "The voir dire in American trials tends to be extensive and probing, operating as a predicate for the exercise of peremptories and the process of selecting a jury protracted . . . the [peremptory] challenge is 'one of the most important of the rights secured to the accused,' . . . *the denial or impairment of the right is reversible error without a showing*

of prejudice," *Swaine* v. *Alabama,* 380 U.S. 202, 218, 219 (1965) [emphasis added].

Even Courts of Appeals have the duty to examine the voir dire examination of the jury in order to be certain that a prejudiced jury did not sit in judgment on a case. *Irwin* v. *Dowd,* 366 U.S. 717, 723 (1961). But petitioner doesn't even know what his jurors said on voir dire; he wasn't there.

Perhaps some effort will be made to contend that petitioner's court-appointed counsel waived this right for him, since petitioner's counsel happened to be present at the time of the voir dire. However, petitioner's counsel was not there to represent petitioner; he was there to represent another client. His loyalty at the time was directed toward the other client, and properly so. Even if petitioner's court-appointed counsel was there to represent petitioner, this Court has already held that the participation by counsel only in the selection of jurors will not suffice. *Lewis* v. *United States,* 146 U.S. 370, 374 (1892). This is so because the petitioner's "life or liberty may depend upon the aid which, by his personal presence, he may give to counsel . . . in the selection of jurors." 146 U.S. 370 at 373; *Hopt* v. *Utah,* 110 U.S. 574, 578, 579.

The accused cannot participate effectively in making challenges unless he is present at the voir dire of the jury panel by the prosecution. The accused must be given the opportunity to observe the jury while the prosecution asks questions in order that he might form more complete opinions and detect possible prejudice in potential jurors, and on that basis of these and other observations, consult with his counsel in making effective peremptory challenges.

Either petitioner has the right to be present during the voir dire examination of the jury by the State, or no defendant in a criminal case has that right. The client has the right to confer with his own attorney in exercising challenges. The mere fact that petitioner was an indigent who had no choice in his counsel does not give the petitioner any less right in this vital procedure. Petitioner's right to be present during his trial having been violated, a new trial is now his right.

This is a plain error which cannot be deemed waived either by the defendant or his counsel when the statute requires his presence. *Lewis* v. *United States,* 146 U.S. 370, 373; *Hopt* v. *Utah,* 110 U.S. 574, 579; *Thompson* v. *Utah,* 170 U.S. 343 (1898); Art. 580, Vernon's Texas Code of Crim. Pro. (1948); Art. 33.03, Vernon's Ann. Texas Code of Crim. Pro. (1966).

Subsequent cases have permitted express waivers, but there are none in this case. To the contrary, waiver by petitioner was denied on motion for new trial (R. 17) where under State law the issue of absence can be raised. Art. 753, Vernon's Tex. Code of Crim. Pro. (1948); Art. 40.03, Vernon's Ann. Tex. Code of Crim. Pro. (1966).

Conclusion

The judgment of the Court of Criminal Appeals should be reversed and remanded for a new trial, or, in the alternative, to afford the Court of Criminal Appeals an opportunity to apply the correct appellate standard of review.

Respectfully submitted,

GORDON GOOCH
FRANK W. R. HUBERT, JR.
Attorneys for Petitioner